No. TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

WASCO LLC, Petitioner, v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, Respondent.	)	From Wake County No. COA 16-414

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PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31(C)

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INDEX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioner WASCO LLC respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals, filed on 18 April 2017, on the basis that the subject matter of the appeal in this case has significant public interest and involves legal principles of major significance to the jurisprudence of the State. In support of this Petition, WASCO shows the following:

INTRODUCTION

This litigation raises a critical question not addressed in any prior North Carolina case, namely: what is the proper test to determine whether a party will be held liable as an "operator" under the portions of the North Carolina Solid Waste Management Act applicable to hazardous waste management ("SWMA"), and, more particularly, can a party who never owned or operated a solid waste management facility and did nothing to cause or contribute to contamination at a site be held liable for the full extent of any required cleanup based on a terminated contractual agreement to finance and guarantee certain post-closure care and other non-regulated activities made after the facility has officially closed. The resolution of this critical question has profound policy implications to all parties in North Carolina regulated by SWMA's hazardous waste rules. Under the approach taken by the Court of Appeals, parties like WASCO will be disinclined to provide any funding for beneficial voluntary activities in the future, and will likewise be reluctant to cooperate with state regulators to help assess contaminated sites whenever financial assures are provided, for fear of inadvertently opening the door to additional unwarranted and indeterminate liability.

The need for further clarity on these important matters is highlighted by the divergent approaches taken by the courts below. In the first instance, the administrative law judge granted summary judgment in favor of Respondent North

Carolina Department of Environment and Natural Resources, Division of Waste Management based on a fundamental misapprehension of the facts regarding WASCO's relationship to a separate corporate affiliate. As a result of this misunderstanding, the ALJ did not set forth a definitive position as to the controlling definition of "operator" or how that particular standard should be applied given the actual, undisputed facts.[1]

On appeal, the Superior Court recognized the ALJ's erroneous factual assumption, acknowledging that WASCO itself never owned the real property in question, never caused or contributed to the contamination associated with the facility on that property, and never operated a business onsite.[2] Instead of remanding the case back to the ALJ, however, the Superior Court upheld the grant summary judgment against WASCO on alternative grounds. In so doing, the Superior Court stated that the North Carolina definition of "operator" relied on by WASCO was "ambiguous,"[3] and looked for guidance primarily from federal cases involving a separate federal statute, the Comprehensive Environmental Response,

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[1] *See* Final Decision Granting Respondent's Motion for Summary Judgment at 6-7 (O.S.A.H. Jan. 2, 2015) ("Final Decision") (attached as Appendix ("App.") 1-8).

[2] *See* Final Order and Judgment on Rule 56(f) Motion and Petition for Judicial Review at 10 (Wake County Super. Ct. Oct. 23, 2015) ("Final Order and Judgment") (attached as App. 9-26).

[3] *Id.* at 11-12 & n.3.

Compensation, and Liability Act ("CERCLA"). Based on those decisions, the Superior Court abandoned any close reading of SWMA's statutory text and instead evaluated the case under the "totality of the circumstances."[4]

Subsequently, the Court of Appeals undertook a closer reading of those provisions addressing the meaning of "operator" under the SWMA. With respect to the controlling statutory provision relied upon by WASCO, N.C.G.S. § 130A-290(a)(21), the Court of Appeals held that this definition of "operator" included parties engaged in purely "post-closure regulatory activities,"[5] despite the fact that the provision plainly states that the term extends only to someone who "is principally engaged in, and is in charge of, the ***actual operation***, supervision, and maintenance of a solid waste management facility."[6] It is undisputed that the "solid waste management facility" at issue in this case was officially closed by the State long before WASCO ever became involved at the site.[7] As such, it is a legal

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4 *Id.* at 15.

5 *WASCO LLC v. N.C. Dep't of Env't & Natural Res., Div. of Waste Mgmt.*, ___ S.E.2d ___, 2017 WL 1381586, at *9 (N.C. Ct. App. Apr. 18, 2017) (attached as App. 27-34).

6 N.C.G.S. § 130A-290(a)(21) (emphasis added).

7 *See, e.g.*, Final Decision at 3 (stating that the pit was closed in 1992); Final Order and Judgment at 5 (same); *WASCO*, ___ S.E.2d ___, 2017 WL 1381586, at *2 (stating that the closure plan was completed in 1992 and that Respondent formally accepted certifications of closure in 1993). The federal RCRA regulations define "Final closure" to mean "the closure of all hazardous waste

impossibility for WASCO to be classified as an "operator" of a long-since closed and now non-existent solid waste management facility.[8]

While WASCO maintains that a plain reading of the controlling statutory text leads inexplicably to the conclusion that it is not now, and never has been, an "operator" for purposes of SWMA, even setting the merits to one side, it cannot reasonably be disputed that a controlling decision by this Court on this critical question of first impression would advance significant public interests and bring much needed clarity to the jurisprudence of the State. As it presently stands, the ruling of the Court of Appeals threatens to expose WASCO to millions of dollars of liability for contamination at the site, despite the fact that WASCO never owned the properties or facilities in question, did not cause or contribute to any of the contamination, and never operated a business onsite, never treated, stored or disposed of any waste at the site, and had no physical presence in the State. The most that can be said of WASCO's activities here is that it stepped up — after the facility had been officially closed — to help finance and ensure the post-closure

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management units at the facility in accordance with all applicable closure requirements so that hazardous waste management activities under parts 264 and 265 of this chapter are no longer conducted at the facility unless subject to the provisions in § 262.34." 40 C.F.R. § 260.10.

[8] SWMA defines "closure" to mean "the ***cessation of operation*** of a solid waste management facility and the act of securing the facility so that it will pose no significant threat to human health or the environment." N.C.G.S. § 130A-290(a)(2) (emphasis added).

monitoring and finance a voluntary (non-regulated) air-sparge system at a site previously operated by a separate and legally distinct corporate entity. If financial assurance guarantors could, counter to the plain language of federal law,[9] be subjected to potential liabilities greater than the amount of provided financial assurance, it is hard to imagine that any person, corporation, or financial institution would ever agree to provide such a role in this State ever again.

In light of these critical public interests and significant legal uncertainties created by the decisions below, Petitioner WASCO respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals.

STATEMENT OF FACTS

I. Factual Background

This is a case arising under portions of the North Carolina Solid Waste Management Act applicable to hazardous waste management, N.C.G.S. § 130A-294(c), this State's counterpart to the federal Resources Recovery and Control Act ("RCRA"), 42 U.S.C. §§ 6901 to 6992k. Nationally, RCRA establishes a system to regulate the "owners and operators" of facilities that store, treat, or dispose of hazardous wastes. North Carolina state law implements RCRA for application to hazardous waste facilities in this State.

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[9] *See, e.g.*, 42 U.S.C. § 6924(t).

The fundamental issue in this case is whether WASCO may be held liable as an "operator" of a closed solid waste management facility located at the site of the old Asheville Dyeing & Finishing Plant ("ADF property"), a former textile manufacturing plant on 65 acres located in Swannanoa, North Carolina. The groundwater at this facility was contaminated by manufacturing operations that ceased decades ago. It is undisputed that WASCO never owned the property or conducted any business there; never treated, stored or disposed of any waste there; and did not cause or contribute to the contamination in any way. Nevertheless, if the decision of the Court of Appeals is allowed to stand, the State will argue that WASCO has been deemed an "operator" of this facility, and attempt to subject the company to substantial, continuing responsibilities to remediate contamination caused by other, unrelated parties.

A. The Only Hazardous Waste Management Unit at the ADF Property Was Removed in 1985.

As of 1976, the property at issue in this case was owned and operated by Asheville Dyeing & Finishing ("ADF"), a division of Winston Mills, Inc. As part of its textile manufacturing operation, ADF operated a dry-cleaning process, which involved storage of dry-cleaning chemicals in two underground storage tanks on the property. Winston Mills removed these tanks at the Respondent's direction in

1985.[10] Five years later, Winston Mills and the Respondent entered into an Administrative Order of Consent ("the Closure Order") outlining the steps that Winston Mills would take to "close" the former management unit. The Closure Order required Winston Mills to submit closure and post-closure plans along with cost estimates to complete both plans and "financial assurance" to ensure funding for closure activities and post-closure care. Winston Mills certified that the unit was successfully closed in 1992.[11] After approving the closure certification, Respondent directed Winston Mills to implement the post-closure plan.

B. Winston Mills Sold the ADF Property in 1995 but Retained Its Environmental Liabilities.

Winston Mills sold the ADF property and business to Anvil Knitwear in 1995. Winston Mills and its parent company, McGregor Corporation, both signed the purchase and sale agreement, and both provided a limited indemnity to Anvil Knitwear, subject to specific requirements and limitations. McGregor's parent and an affiliate of the McGregor Corporation, Culligan International Company ("Culligan"), co-guaranteed performance of the indemnity, subject again to certain limitations.[12]

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[10] *WASCO*, ___ S.E.2d ___, 2017 WL 1381586, at *2.

[11] *Id.*

[12] *Id.*

WASCO — then known as "United States Filter Corporation" — acquired the stock of a company that owned the stock of Culligan in 1998. At the time of the acquisition, Culligan was the guarantor of post-closure financial assurance for operator Winston Mills, associated with the former tank that Winston Mills closed in 1992.[13] Importantly, WASCO remained separate and distinct from Culligan at all times, and never had any affiliation with Winston Mills.

C. Respondent Began Making Demands of WASCO After It Divested Itself of Culligan in 2004.

WASCO divested itself of Culligan in 2004. Prior to the divestiture, however, WASCO established a letter of credit for Culligan to provide "for the account of [Asheville Dyeing & Finishing]."[14] WASCO also created a standby trust on behalf of ADF to go with the letter of credit. At the Respondent's direction, WASCO also submitted three permitting forms in which it identified itself as an "operator." The first was an "Amended Part A Application" submitted in 2004. The second was a "hazardous waste report" submitted in 2006. The third was another Amended RCRA Part A Application submitted in 2008. Again, WASCO submitted all three forms at the express direction of Respondent based on the financial assurances that WASCO had previously made.

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[13] *Id.* at *3.

[14] *Id.*

In connections with those requests, WASCO also paid for a consultant, Mineral Springs, Inc., to conduct semi-annual post-closure groundwater sampling, and perform monthly checks on a voluntary (non-regulated) air sparge system on the property. WASCO also reviewed and sometimes provided minor factual edits to reports prepared by Mineral Springs before they were submitted to Respondent.

D. The Respondent Escalated Its Demands Against WASCO in 2007.

By 2007, the Respondent began to request that WASCO undertake even more extensive activity. In March 2007, Respondent informed WASCO that the property required "corrective action" and that Respondent would begin working with WASCO to develop a plan and a schedule for doing so.[15] A month later, citing the 1990 Closure Order (which was never assigned to or assumed by WASCO or Culligan), Respondent alleged that WASCO was responsible for monitoring groundwater associated with wastes associated with releases from other areas on the site, none of which were caused by WASCO or Culligan. Respondent also asserted that WASCO was required to assess an abandoned "dump" containing rocket fuel, munitions, warfare chemicals, and smoke bombs that had been created on the property in the 1960s by Northrop Carolina, an entirely separate corporate entity with no affiliation to WASCO or Culligan. Respondent

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15 *Id.*

further demanded that WASCO submit a detailed, comprehensive, three-part assessment plan to address environmental issues throughout the entire site.

WASCO cooperated with Respondent even as it tried to understand the basis for these demands. As it considered its options, WASCO continued to fund the environmental consultant that was conducting semi-annual post-closure care and monthly checks on the voluntary air sparge system. At Respondent's direction, and under duress, WASCO also funded certain limited, beneficial assessment activities at the site. The consultant, who strongly disagreed with the Respondent's directive to assess the Northrop Carolina "dump area," begin drafting the demanded assessment plan.

E. Anvil Knitwear Sold the Property to the Current Owner and Operator, Dyna-Diggr, LLC, in 2007.

In 2007, Anvil Knitwear sold the ADF property to its current owner and operator, Dyna-Diggr, LLC. WASCO has no affiliation with Dyna-Diggr. In particular, WASCO does not have any contract, lease, or other agreement with Dyna-Diggr to use, occupy, or control the property or any portion of it. Dyna-Diggr keeps the closed and capped site of the former underground storage tank inside a locked fence that itself is situated within a perimeter security fence around the entire facility, such that inspectors cannot gain access to site property. Further, in April 2010, and again in 2012, Dyna-Diggr submitted its own Part A forms to

the Respondent, identifying it as the *sole* owner and operator of the facility at issue, dating back to December 1, 2007.

F. Respondent's Continued and Escalating Demands Left WASCO with Little Choice But to Seek the Protection of the Courts.

By August 2013, Respondent escalated its demands still further, threatening to issue a Compliance Order with Administrative Penalties unless WASCO obtained a "post-closure permit" or agreed to some other resolution requiring it to undertake significant post-closure care obligations.[16] At that point, WASCO was left with little choice but to seek judicial relief from the courts.

II. Procedural History

WASCO initiated this case as an administrative proceeding on 27 September 2013 by filing a Petition for Contested Case Hearing with the Office of Administrative Hearings. WASCO's Petition asserted errors with the August 2013 letter and sought a declaration that it is not an "operator" of any facility on the ADF property. On 25 September, 2014, before the close of discovery, the Respondent filed a motion for summary judgment asking the ALJ to dismiss WASCO's Petition. On 23 October 2014, with Respondent's motion pending, WASCO requested additional time to take a Rule 30(b)(6) deposition that had been noticed prior to Respondent filing its motion for summary judgment. In response,

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16 *Id.*

on 23 October 2014, the Respondent sought a stay of all discovery pending resolution of its summary judgment motion.

Without holding a hearing on these pending motions, the ALJ, on 28 October 2014, entered an order rejecting WASCO's request for additional time to take discovery and instead staying all discovery pending resolution of the Respondent's motion for summary judgment. In a subsequent order filed 2 January 2015, and despite the outstanding deposition notice, the ALJ rendered a "Final Decision" granting the Respondent's motion for summary judgment and dismissing WASCO's Petition.

On 2 February 2015, WASCO filed a petition for judicial review of the ALJ's decision with the Superior Court of Wake County. On 23 October 2015, the Superior Court entered its "Final Order and Judgment," denying WASCO's petition and affirming the ALJ's decision.

WASCO filed and served its notice of appeal of the Superior Court's Final Order and Judgment on 19 November 2015. In a published opinion issued 18 April 2017, the Court of Appeals affirmed the judgment of the Superior Court and held that WASCO is an "operator" of a landfill for purposes of the post-closure permitting requirement at the Site. WASCO now seeks to appeal that decision to this Court.

REASONS WHY CERTIFICATION SHOULD ISSUE

WASCO asks the Court to certify this case for review pursuant to N.C.G.S. § 7A-31(c), which authorizes certification when "(1) The subject matter of the appeal has significant public interest, or (2) The cause involves legal principles of major significance to the jurisprudence of the State . . . ."

To begin with, the Court of Appeals in its unprecedented ruling has created enormous legal uncertainty in the scope of potential liability under the SWMA. Rather than applying the controlling definition of "operator" found in Section 130A-290(a)(21), the Court of Appeals opted instead to follow federal cases addressing a different statute with a very different regulatory scheme. This decision not only violated the cardinal rule of statutory interpretation,[17] but also created unprecedented and unanticipated potential liability for parties like WASCO. Indeed, the decision below appears to be the first case in the country where a court has imposed "operator" liability under RCRA (or its state counterpart) where the party never owned the property in question; never conducted any business there, never treated, stored or disposed of any waste at the

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[17] *R.J. Reynolds Tobacco Co. v. N.C. DENR*, 148 N.C. App. 610, 616, 560 S.E.2d 163, 168 (2002) ("When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." (citing *Lemons v. Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 688 (1988))); *accord High Rock Lake P'ners, LLC v. N.C. Dep't of Trans.*, 366 N.C. 315, 324, 735 S.E.2d 300, 305 (2012).

facility; had nothing to do with the facility until after it had been closed; and acted only to help finance and ensure post-closure care on behalf of a separate entity. By over-extending the applicable law in this way, parties throughout the State who have provided financial assurances to ensure post-closure care face enormous uncertainty as to whether they may be subjected to the possibility of incurring "operator" liability under an amorphous "totality of the circumstances" standard rather than the standard set forth under the SWMA.

Moreover, the decision of the Court of Appeals places purported "operators" like WASCO in an impossible situation, having to choose between refusing to comply with the over-reaching demands of state regulators, thereby risking substantial administrative and civil penalties, or taking affirmative steps that might later be used by those same regulators to justify imposing "operator" liability. In fact, the decision below punishes parties like WASCO for complying with agency directives, creating perverse incentives against cooperating with state regulators. The result of this state of affairs is that parties will be less likely to provide financial assurances to help clean up contaminated sites and will be far less willing to take steps requested by state regulators in ensuring that those sites are remediated. These unintended consequences would be bad for the environment, bad for the regulated community, and bad for the citizens of North Carolina.

I. The Court of Appeals Failed to Properly Apply North Carolina Law, Creating Enormous Uncertainty as to Important Legal Principles.

To establish that WASCO is an "operator" under the applicable law, Respondent should have been required to prove that WASCO is (1) "principally engaged in" and (2) "in charge of" (3) the "actual operation, supervision, and maintenance" (4) of a "solid waste management facility."[18] The Court of Appeals did not make these required highly fact-intensive findings. Moreover, the record does not support a conclusion that WASCO is an operator within the meaning of the statute, which the Court of Appeals attempts to circumvent by focusing upon federal regulations, albeit in a manner that ignores the clear and unambiguous language of the statute, thereby rendering the controlling language superfluous.[19]

RCRA regulates persons who own or operate facilities that manage, store, or treat hazardous wastes, and WASCO never did those things. It never owned the contaminated property or conducted business there. It did not cause or contribute to the contamination at this property in any way. It became involved with this property, not because it was an operator of any facility, but because of financial assurance it provided for a former corporate affiliate, Culligan, to provide on

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[18] N.C.G.S. § 130A-290(a)(21).

[19] "[A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant." *R.J. Reynolds Tobacco Co.*, 148 N.C. App. at 616, 560 S.E.2d at 168 (quoting *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981)).

behalf of Asheville Dyeing & Finishing after the facility had already been closed. If WASCO has any liability, therefore, it is that of a guarantor — subject to the terms of the instrument, which is capped in the amount set forth in the approved post-closure plan — not as an operator.[20]

Despite the fact that RCRA was enacted more than forty years ago, neither the courts below nor Respondent have produced a single case from *any* jurisdiction in which an entity has been found to be a RCRA "operator" based entirely on in its interaction with a RCRA facility after the facility closed. This glaring omission speaks volumes. There are two simple explanations for why this precedent does not exist. First, "closure" marks "the cessation of operation of a solid waste management facility."[21] It is impossible to become the "operator" of something after it has ceased to operate. Second, the applicable statutory language is clear and unambiguous, so judicial circumvention of that language is not warranted.

In an attempt to justify its novel and unprecedented reading of the law, the Court of Appeals pointed to various provisions of the SWMA regarding "post-closure liability," but these references all miss the mark. What WASCO disputes is the concept of "post-closure ***operatorship***," not post-closure liability. WASCO acknowledges the state and federal statutes require the owners and operators of

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[20] 42 U.S.C. § 6924(t)(4).

[21] N.C.G.S. § 130A-290(a)(2).

certain RCRA facilities to provide post-closure care after they close. But this post-closure liability is incurred by those persons who actually operate facilities before they close — that is, before they cease to operate. Also, because it is possible to purchase a closed facility, but not to operate one, it is possible to become an "owner" subject to post-closure liability at any time.

Indeed, this is precisely how the statute is supposed to work: As a condition of having the privilege to own and operate facilities that handle hazardous wastes, the owners and operators of such facilities incur a long-term obligation to provide post-closure care after the facilities close.[22] As EPA has explained, "[s]uch *future* responsibilities are the correlative duty that must accompany the *current* right to dispose of hazardous waste."[23]

Rather than adhering to the plain language of the statute, the Court of Appeals, following Respondent's lead, relied on cases that discuss operator liability under CERCLA. These CERCLA cases might be relevant in some respects, such as piecing the corporate veil, but they are not relevant to this discussion about ***closed RCRA facilities*** because there is no such concept under CERCLA. The terms "closure" and "post-closure" apply only to RCRA and the SWMA, which unambiguously defines "closure" as the point in time when a

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[22] 47 Fed. Reg. 32274, 32292 (July 26, 1982).

[23] *Id.* (emphasis added).

facility, or as is the case here the only regulated hazardous waste management unit, ceases to operate.[24] Because CERCLA facilities never close, CERCLA cases contribute nothing to the discussion of operator liability at closed RCRA facilities, or facilities closed under SWMA.

Moreover, the CERCLA cases cited addressing the "totality of the circumstances" do not serve as a cure-all for Respondent's defective claims. The "totality of the circumstances" standard (a fact-intensive test not proper for summary judgment) permits the trier of fact to consider the context in which actions alleged to give rise to operator liability occurred,[25] but it does not permit courts to ignore applicable statutory definitions or invent new theories to transfer liability from one entity to another. The proper, fact-intensive question is whether circumstances show WASCO was (1) "principally engaged in" and (2) "in charge of" (3) "the actual operation, supervision, and maintenance" (4) of a "solid waste management facility."[26] They do not. Because the statutory elements are not met, WASCO is not an operator, and the Court of Appeals should be reversed and the judgment below should be vacated.

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[24] N.C.G.S. § 130A-290(a)(2).

[25] *Pinal Creek Grp. v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1041 (D. Ariz. 2005).

[26] N.C.G.S. § 130A-290(a)(21).

Should this Court decline to review the decision below, the vague and amorphous standard used to decide whether parties may be subject to "operator" liability will wreak havoc on the current system in which parties agree, voluntarily, to provide financial assurances to ensure post-closure care on behalf of other entities and cooperate with state regulators regarding that care. Under those circumstances, it is difficult to see why any person, corporation, or financial institution would voluntarily take such an unwarranted and uncertain risk. For those existing situations where a party (such as a corporate affiliate or a financial institution) has already provided financial assurance, those guarantors will now studiously avoid any activity that could possibly be construed as "operating," even doing something as innocuous as submitting paperwork requested by state regulators. As for future cases, entities like WASCO will be very reluctant to agree to provide financial assurances at all lest state regulators attempt to turn those agreements into a basis for insisting on additional activities, placing them in the dilemma of either risking substantial penalties for non-compliance or opening the door to potential operator liability. Likewise, those who currently own or operate active facilities will have a very difficult time securing the financial assurances required by law. Given the seriousness of the stakes involved, it would be to the benefit of all involved — including Respondent itself — for the Court to shed further light on these issues and concerns.

II. The Court of Appeals' Decision Creates a Perverse Incentive Against Cooperating with State Regulators.

Finally, even setting aside the significant and unprecedented legal uncertainty created to the jurisprudence of this State, the decision of the Court of Appeals, if allowed to stand, would directly implicate substantial public interests related to the management, closure, post-closure and remediation of hazardous waste sites in North Carolina. Whatever one may think of the legal merits of this case, it cannot reasonably be disputed that the resolution of these issues will, for better or worse, significantly affect the ability of parties who own or operate solid waste management facilities to obtain financial assurance covering post-closure care and otherwise alter the willingness of parties to cooperate with state regulators in connection with issues similar to those at issue in this matter.

Over the course of many years, Respondent sought to use the "financial assurance" provided by WASCO on behalf of Asheville Dyeing & Finishing to force WASCO to undertake new obligations extending far beyond the limited terms of the set financial assurance. While WASCO honored what it perceived to be potentially valid (but not conclusively established) commitments, including providing the noted financial assurance, which is approximately $445,000, it did not agree to become — and it does not meet the fact-intensive definitional elements of — an "operator" under SWMA. Yet the decision of the Court of Appeals now threatens to expose WASCO to millions of dollars for other,

unrelated contamination at the site, despite the fact that WASCO never owned the properties or facilities in question, did not cause or contribute to any of the contamination, never operated an active business onsite, never treated, stored or disposed of any waste at the site, and never had a physical presence in the State. If the existence of this type of guarantee can be used as evidence of a guarantor's "operatorship" under the SWMA, then every guarantor would bear a significant risk of being deemed an operator, and no reasonable person would ever execute such a guarantee.

The ruling below would also have a similar dampening effect on any willingness to cooperate with state regulators in connection with the SWMA. In this case, for example, WASCO — at the direction and insistence of Respondent — supplied certain permit applications and other forms that owners and operators of regulated facilities are typically required to submit. WASCO complied with Respondent's demands because RCRA's liability scheme provides severe penalties for refusing, including civil and administrative penalties of up to $37,500 per day for each day a required form is late.[27] For similar reasons, WASCO also agreed to pay a consultant in response to the Respondent's demands to perform certain limited assessment activities, but this does not establish that WASCO was an operator legally required to do so either. To hold otherwise punishes WASCO for

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[27] *See, e.g.*, 42 U.S.C. § 6928(g).

acting responsibly. In the face of the Respondent's assertion that WASCO was legally required to perform these services or potentially incur substantial penalties, it would have been extremely risky for WASCO to refuse.

To help entities in WASCO's situation, the EPA has adopted a "protective filer" policy under RCRA that encourages regulatory filings by declaring these submissions to have no legal effect when filed in error.[28] The policy is a recognition by EPA that operator liability is incurred, not by submitting forms, but by actually operating a facility that stores, handles, or treats hazardous wastes. The underlying force driving this policy is the recognition that it is better for regulators to have more rather than less information. Agencies thus encourage parties to submit filings, even if it later turns out the filing was unnecessary or not required, rather than attempting to use those filings to score further concessions. In short, the policy encourages parties, even when in doubt, to go ahead and file as a precautionary matter.[29]

The decision of the Court of Appeals fatally undermines such an approach. As seen here, Respondent has been allowed to leverage its ability to impose

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[28] *See* 50 Fed. Reg. 38,946, 38,948 (Sept. 25, 1985).

[29] *See, e.g., In re Quaker State Oil Refining Corp.*, EPA No. RCRA-III-116, 1986 WL 69020, at *3-4 (EPA Feb. 6, 1986) (holding that that Quaker State should not face legal consequences for having mistakenly declared a waste to be "hazardous" when it was not; if the underlying facts do not establish operator liability, then the form itself has no legal effect).

substantial financial penalties to force WASCO to take actions like submitting permitting forms, and has now sought to use those actions (taken under protest) to try and impose even greater liability on WASCO as an "operator."

By punishing WASCO for complying with agency directives to submit permit applications and comply with other demands — treating such compliance as evidence that WASCO is an actual "operator" — the decision of the Court of Appeals creates a perverse incentive against cooperating with state regulators. This decision contravenes the "protective filing" doctrine under RCRA and is harmful public policy for the State of North Carolina more generally. Given the risks involved, the owners and operators of solid waste management facilities in North Carolina, as well as those who provide financial assurances for post-closure care, ought to be afforded a clear understand as to how these issues and concerns will be handled by our courts.

ISSUES TO BE BRIEFED

In the event the Court allows this Petition for Discretionary Review, the Petitioner intends to present the following issues in its brief to the Court:

I. Whether the Court of Appeals erred by finding WASCO to be liable as an "operator" as a matter of law under the North Carolina Solid Waste Management Act.

II. Whether the Court of Appeals erred by holding that WASCO was an "operator" of a solid waste management facility that had been formally closed before WASCO ever became associated with it.

III. Whether the Court of Appeals erred by holding that WASCO became an "operator" by performing actions that Respondent demanded of it under penalty of law based on allegations that WASCO was an operator.

CONCLUSION

Because this appeal has significant public interest and involves legal principles of major significance to the jurisprudence of the State in satisfaction of N.C.G.S. § 7A-31(c), WASCO respectfully requests that the Court grant this Petition for Discretionary Review.

Respectfully submitted, this 23rd day of May, 2017.

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CERTIFICATE OF SERVICE

I certify service of the foregoing on the following counsel of record via U.S. Mail, postage prepaid, and via email, addressed as follows:

NORTH CAROLINA DEPARTMENT OF JUSTICE
Daniel Hirschman,
Special Deputy Attorney General
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N.C. State Bar No. 27252
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This 23rd day of May, 2017.

KING & SPALDING LLP

/s/ Cory Hohnbaum

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13EHR18253

WASCO LLC Petitioner and DYNA-DIGGR LLC Intervenor v. NC DEPT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT Respondent	**FINAL DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

This matter is before the undersigned on the *Motion for Summary Judgment* filed September 25, 2014 by the Respondent North Carolina Department of Environment and Natural Resources, Division of Waste Management, acting by and through its Hazardous Waste Section (hereinafter "the Section"), pursuant to N.C.G.S. § 1A-1, Rule 56, and 26 NCAC 03 .0115(a), seeking entry of a Final Decision pursuant to N.C.G.S. § 150B-34. Upon due consideration of the submissions of the parties and the applicable statutes, regulations, and legal precedents, the following dispositive Order is entered.

Statement of the Case

Petitioner seeks to be relieved of the obligation to provide control and remediation at a hazardous waste site in Swannanoa. The pit at the former Asheville Dyeing and Finishing Plant site once held an underground storage tank for waste *perchloroethylene* ("PCE"), a suspected carcinogen, and contains significant residual contaminated soil and groundwater today.

The entity currently constituted as WASCO LLC ("WASCO"), began its involvement with the site in 1995. *See*, Respondent's Exhibits to the *Motion for Summary Judgment,* tab G, section 3, page 364, and tab B, section 12, page 67 (hereinafter, "R Ex p 364 & 67.") The Section sent the letter that triggered the filing of this contested case to the Petitioner and the Intervenor on August 16, 2013 (*see*, R Ex p 23). The letter concerned the requirements of the State Hazardous Waste Program, and asserted, in relevant part, that WASCO was an "operator," and consequently required to obtain a post-closure permit, or an "Administrative Order on Consent" ("AOC") in lieu of the post-closure permit, pointedly noting that, "If an agreement ... cannot be reached, the Section always has the option of issuing a Compliance Order with Administrative Penalty for violation of 40 C.F.R. § 270.1(c) and associated post-closure regulations." Petitioner's recalcitrance represented a stark departure from its past relationship with the Respondent. See, *e.g.*, a draft Administrative Order on Consent submitted by

Petitioner's then-counsel, together with a list of 42 reports of remediation and containment work performed by Petitioner's contractors. R Ex p 46-56.

WASCO filed a Petition commencing this contested case in the Office of Administrative Hearings on September 27, 2013, alleging that the Section's characterization of WASCO as an "operator" in this context deprived WASCO of property or otherwise substantially prejudiced its rights and violated the North Carolina Administrative Procedure Act ("NCAPA"), N.C.G.S. § 150B-23(a). As the current owner of the property, and facially liable as such under the applicable environmental statutes, Dyna-Diggr LLC ("Dyna-Diggr") was permitted to intervene on December 12, 2013.

Respondent recounts that WASCO served its first set of discovery requests on January 6, 2014, and that, to date, the Section has responded to two (2) sets of Requests for Admission (212 requests in total), two (2) sets of Requests for Production of Documents (110 requests in total), and one (1) set of Interrogatories; has produced various business records, including over 11,000 pages of emails; and, has provided WASCO with electronic access to its public file.

The Section's *Motion for Summary Judgment* was filed with over 1,200 pages of exhibits. WASCO moved for and received a 30-day extension of the usual 10-day period to file a Response to the Motion. On October 21, 2014, WASCO filed a second motion for an extension of time, supported by a 12-page brief with five attachments totaling approximately 50 pages, including an *Affidavit of WASCO's Counsel Dan Biederman*; followed by an *Amendment and Supplement of Affidavit of WASCO's Counsel Dan Biederman* (approximately 30 pages), including legal arguments concerning key question of the proper statutory interpretation of the term "operator." Petitioner argued that it needed to take, transcribe, and review the Section's Rule 30(b)(6) deposition(s) before responding to the motion. On October 22, 2014, the Section filed a Reply opposing WASCO's motion and moved to stay discovery pending resolution of the summary judgment motion.

WASCO's only outstanding discovery request is a *Notice to Depose* the Section per N.C. Gen. Stat. § 1A-1, Rule 30(b)(6). This was projected to entail taking the depositions of four Section employees concerning their personal knowledge about the parties' activities concerning the hazardous waste site. (Their Affidavits appear at R Ex p 1178-95.) Petitioner argued that the parties had discussed taking these depositions in early December, before the December 5, 2014 discovery deadline, but asked that the additional time to respond to the Motion be extended to 45 days following receipt of the transcripts -- which Respondent contended would extend the time for non-moving party's response to a total of 117 days from the date the motion was filed.

In consideration of the breadth of completed discovery; the probability that "the facts which would have raised a genuine issue of material fact were within the defendant's knowledge," based on the theory of Respondent's motion, *Gebb v. Gebb*, 67 N.C. App. 104, 108, 312 S.E.2d 691, 694 (1984); the opportunity Petitioner had to identify any such material facts in its Response; and, the unjustifiable delay and imposition on Respondent of further discovery in light of these circumstances, the undersigned denied Petitioner's request for additional months to respond, and granted Respondent's request for a stay of discovery until the summary judgment Motion was resolved, in an Order entered on October 28, 2014.

On November 7, 2014, WASCO responded to the Section's *Motion for Summary Judgment* in detail, appending seven affidavits with numerous attachments, and requested a hearing on the motion. Following opportunities for the parties to suggest language for this Order, the motion is determined in accordance with 26 NCAC 03 .0115(b).

Statement of the Undisputed Facts

This contested case concerns real property located at 850 Warren Wilson Road, Swannanoa, North Carolina, 28778, which was assigned the United States Environmental Protection Agency ("EPA") Identification Number NCD 070 619 663 ("the Facility").

A pit at the Facility once contained an underground storage tank for waste perchloroethylene ("PCE"), a dry cleaning solvent. The pit was closed as a landfill in 1992 with contaminated soil left in place. Significant groundwater contamination remains today.

Petitioner initially became involved with the Facility in 1999. At the time, it was known as United States Filter Corporation or USFilter. WASCO later changed its name to Water Applications & Systems Corporation, and then was converted to the limited partnership with the name WASCO, LLC.

On June 15, 1998, the Petitioner -- then known as United States Filter Corporation -- acquired Culligan Water Technologies, Inc. (hereinafter, "Culligan"). (R Ex p 362) In its March 31, 1998 Form 10-K filing with the Securities and Exchange Commission, Petitioner disclosed that:

> In 1995, Culligan purchased an equity interest in Anvil Holdings Inc. As a result of this transaction, Culligan assumed certain environmental liabilities associated with soil and groundwater contamination at Anvil Knitwear's Asheville Dyeing and Finishing Plant (the "Plant") in Swannanoa, North Carolina. Since 1990, Culligan has delineated and monitored the contamination pursuant to an Administrative Consent Order entered into with the North Carolina Department of Environment, Health and Natural Resources relating to the closure of an underground storage tank at the site. Groundwater testing at the plant and two adjoining properties has shown levels of a cleaning solvent believed to be from the Plant that are above action levels under state guidelines. The company has begun remediation of the contamination. The company currently estimates the cost of future site remediation will range from $1.0 million to $1.8 million and that it has sufficient reserves for the site cleanup.

(R Ex p 364). Culligan assumed responsibility for the environmental operations at the Facility in a Guaranty Agreement in favor of the property's buyer, Anvil Knitwear, Inc., in return for $9 million (R Ex p 352), exchanged for stock in Anvil Holdings, Inc. (R Ex p 335), as a part of a transaction in which Winston Mills, Inc. and McGregor Corporation, both wholly owned by Astrum International Corp., sold "all of [their] assets comprising their Anvil Knitwear division"

to Anvil Knitwear, Inc. and Anvil Holdings, Inc., including the Facility in Swannanoa. (See deed from Winston Mills to Anvil Knitwear, Inc. (R Ex p 249), which includes an environmental "exception.") Astrum was a co-guarantor with Culligan and, in effect, guaranteed Culligan's performance under the Guaranty Agreement. (R Ex p 352)

Three months later, Culligan, as "a subsidiary of Astrum International Corp.," executed a *Corporate Guarantee for Closure or Post-Closure Care* to the United States Environmental Protection Agency ("EPA") declaring that, "For value received from the operator, guarantor [Culligan] guarantees to EPA that in the event the operator fails to perform post-closure care of the [Facility] ... the guarantor shall do so or establish a trust fund" to defray the expense of "post-closure care" of the Facility. (See Exhibit B to Dyna-Diggr's *Motion to Intervene*.) The operator was identified as "Winston Mills, Inc. ... which is a subsidiary of Astrum International Corp."

To assure payment for the obligations it assumed with its acquisition of Culligan, Petitioner entered into a "Trust Agreement " (conforming with 40 C.F.R. § 264.143, with North Carolina modifications) with Petitioner as the "Grantor," and Wells Fargo Bank, N.A. as "Trustee," to "establish a trust fund ... for the benefit of DENR." It recites that:

> ... [T]he Department of Environmental and Natural Resources, "DENR," an agency of the State of North Carolina, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available when needed for closure and/or post-closure care of facility[.]

(R Ex p 409) In Section 4, "Payment for Closure and Post-Closure Care," the Trust Agreement provides that

> The Trustee shall make payments from the fund as the Secretary of the Department of Environmental and Natural Resources (the "Secretary") shall direct, in writing, to provide for the payment of the cost of closure and/or post-closure care of facilities covered by this agreement.

(R Ex p 410). The agreement further provides that, "this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Secretary, or by the Trustee and the Secretary, if the Grantor ceases to exist." (R Ex p 413) The location of the subject property, and the estimated costs, are listed. That amount -- adjusted to $443,769.98 by June 27, 2013 -- is guaranteed by a Letter of Credit. (R Ex p 524)

The Trust Agreement defines the "Grantor" as "the owner or operator who enters into this agreement and any successors or assigns of the Grantor." (R Ex p 409)

Between 1999 and the present, WASCO has supplied and maintained post-closure financial assurance for the Facility. WASCO or its employees and the Section have communicated directly concerning financial assurance and other matters related to the Facility's

environmental compliance. WASCO is named as an operator in EPA forms submitted to the Section in 2004, 2006, and 2008.

Between 2004 and the filing of the instant contested case, WASCO has hired and paid for the work of Mineral Springs Environmental, P.C. ("Mineral Springs") concerning the Facility, including operation and maintenance of air sparge/soil vapor extraction systems, groundwater sampling, preparation of reports and their submission to the Section, project management, assessment activities, and payment of utility bills. WASCO has been in communication with Mineral Springs concerning the aforementioned work and has edited draft documents.

The site was transferred to Intervenor Dyna-Diggr, LLC on December 18, 2007. (R Ex p 249) WASCO continued to maintain the Facility's financial assurance, pay for remediation costs including sampling and reporting, and use Mineral Springs as an environmental consultant in communications with the Section following Dyna-Diggr's purchase of the Facility.

Regulatory Framework

The "State Hazardous Waste Program" consists of the North Carolina Solid Waste Management Act ("the Act"), contained in N.C. Gen. Stat. Chap. 130A, Art. 9, §130A-290, *et seq.*, and the rules promulgated thereunder and codified in Subchapter 13A of Title 15A of the North Carolina Administrative Code ("the Rules"), which the Department has been authorized to operate in lieu of the federal program under the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 - 6992k.

The regulation cited in the letter, 40 C.F.R. § 270.1, which "establish provisions for the [Federal] Hazardous Waste Permit Program," is adopted by reference at 15A NCAC 13A .0113(a), and enables approved States to implement and enforce "basic EPA [Environmental Protection Agency] permitting requirements, such as application requirements, standard permit conditions, and monitoring and reporting requirements," that are "part of a regulatory scheme implementing RCRA," 42 U.S.C. 6091 et seq., including entering into "enforceable documents for post-closure care" of hazardous waste sites, which may include a "remedial action" pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1976 ("CERCLA"), as amended RCRA, commonly known as the "Superfund" legislation.

The Act instructs the Department to "cooperate . . . with . . . the federal government . . . in the formulation and carrying out of a solid waste management program," including a program for the management of hazardous waste "designed to protect the public health, safety, and welfare; [and to] preserve the environment." N.C.G.S. § 130A-294(a)(2), (b). The Act mandates the adoption of rules to implement that program, which the Department "shall enforce." N.C.G.S. § 130A-294(b). The Rules largely adopt and incorporate the applicable federal regulations by reference. The authority to enforce the State Hazardous Waste Program has been delegated to the Director of the Division of Waste Management. The Director has issued a sub-delegation of this authority to the Chief of the Section.

"Operator"

The State Hazardous Waste Program requires that "operators . . . of landfills" obtain post-closure permits. 40 C.F.R. § 270.1(c) (adopted by reference at 15A NCAC 13A .0113(a)). Here,

the former waste-PCE tank at the Facility is a "landfill," within the meaning of the regulation. WASCO's Petition was occasioned by the Section's proposed agreement with other responsible parties concerning post-closure care of the facility, but WASCO's position that it is not in the position of an "operator" has implications for all of its responsibilities for the Facility.

The material facts necessary to the legal determination of whether Petitioner has the responsibilities of an "operator," within the meaning of the applicable laws and regulations, are not in dispute.

WASCO's post-closure operator liability for the Facility is a matter of statutory construction -- a question of law. As a matter of law, the parties dispute whether the definition of "operator" in N.C.G.S. § 130A-290(a)(21) or the definitions in 40 C.F.R. §§ 260.10, 270.2 (adopted by reference at 15A NCAC 13A .0102(b), .0113(a)) apply. Viewing the evidence in the light most favorable to WASCO, it is not necessary for the undersigned to resolve this issue. The result is the same under either definition. While the parties have identified no North Carolina case law interpreting the meaning of the term "operator" under the State Hazardous Waste Program, guidance from the EPA, case law from other jurisdictions—including a unanimous opinion of the Supreme Court, and the undisputed facts related to WASCO's more than 14 years of involvement with the Facility support the Section's characterization of WASCO as a post-closure "operator."

Respondent relies primarily on the United States Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). That case, the Court began by noting the simplistic statutory definition of "operator" as "any person owning or operating such [CERCLA regulated] facility." "Here of course we may again rue the uselessness of CERCLA's definition of a facility's 'operator' as 'any person …operating' the facility, 42 U.S.C.A. § 9601(20)(A)(ii), which leads us to do the best we can to give the term its 'ordinary or natural meaning.'" The Court concluded with a broad, comprehensive contextual reading of the term applicable beyond the specific facts of the case before it.

> [U]nder CERCLA, an **operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility**. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, and operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, **or decisions about compliance with environmental regulations**.

(Emphasis mine.) *United States v. Bestfoods*, 524 U.S. 51, 66-67, 118 S. Ct. 1876, 1887, 141 L. Ed. 2d 43 (1998). This understanding of the term "operator" conforms with Congress' declared "national policy … that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated" and that "[w]aste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." The utility of this application of "operator" is emphasized elsewhere in *Bestfoods* by the observation that, "even a saboteur who sneaks into the facility at night to discharge its poisons out of malice" could not escape operator liability "[u]nder the plain language of" 42 U.S.C. § 9607(a)(2). *Id.*, at 524 U.S. 51, 65, 118 S. Ct. 1876, 1886, 141 L. Ed. 2d 43.

Petitioner proposes a series of refinements to the definition of "operator" or its application that would exclude it. But it is difficult to believe that such exceptions could be carved out for a corporate entity that voluntarily took on the responsibility of operating the facility in return for value received. It is notable that, for some years, even the States were not afforded the protections of the 11th Amendment from Superfund claims. *See*, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-14, 109 S. Ct. 2273, 2281, 105 L. Ed. 2d 1 (1989), overruled by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66, 116 S. Ct. 1114, 1128, 134 L. Ed. 2d 252 (1996).

It is noted that, in light of the substantial discovery completed, the detailed arguments raised by WASCO in its Response and accompanying Affidavits - including WASCO's alternative request for summary judgment in its favor - and because the putative issues of material fact raised by WASCO do not bear on the determinative legal issue, it appears that WASCO has not been prejudiced by not having the Rule 30(b)(6) depositions it proposed to take prior to its response to the present motion.

FINAL DECISION

Respondent is entitled to judgment as a matter of law, and consequently, the Petition must be, and hereby is, DISMISSED. N.C. Gen. Stat. §§ 150B-34(e); 1A-1, Rule 56.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 2nd day of January, 2015.

Hon. J. Randolph Ward
Administrative Law Judge

On this date mailed to:

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This the 2nd day of January, 2015.

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STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
COUNTY OF WAKE	15 CVS 1438
WASCO LLC,	
Petitioner,	
v.	**FINAL ORDER AND JUDGMENT ON RULE 56(f) MOTION AND PETITION FOR JUDICIAL REVIEW**
N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT,	
Respondent.	

This matter came on for hearing 12 October 2015, before the Honorable G. Bryan Collins, Jr., Superior Court Judge presiding, on the Petition for Judicial Review ("PJR") filed by WASCO LLC ("WASCO"). Having considered the PJR, the briefs filed by the parties, the complete official record in this case, and the oral arguments of counsel for the parties, the Court hereby AFFIRMS (A) the 28 October 2014 interlocutory order of Administrative Law Judge J. Randolph Ward ("ALJ Ward") denying WASCO's Motion for Continuance Regarding Respondent's Summary Judgment Motion, and (B) ALJ Ward's 2 January 2015 final decision granting summary judgment in favor of Respondent, North Carolina Department of Environmental Quality ("the Department"),[1] Division of Waste Management, acting through its Hazardous Waste Section ("the Section"), and enters the following:

Procedural History

1. In a letter dated 16 August 2013, concerning the requirements of the State Hazardous Waste Program, the Section alleged that WASCO was an "operator" of a landfill for

[1] The North Carolina Department of Environment and Natural Resources has been renamed the Department of Environmental Quality effective 18 September 2015.

purposes of 40 C.F.R. § 270.1(c) (adopted by reference in 15A NCAC 13A .0113(a)) and needed to obtain a post-closure permit or administrative order on consent in lieu of a post-closure permit. WASCO disputed this assertion in a 27 September 2013 Petition for a Contested Case Hearing.

2. The parties exchanged written discovery, with WASCO's first requests served on the Section 6 January 2014. Prior to filing a motion for summary judgment ("MSJ"), the Section responded to 212 total Requests for Admission, 1 set of Interrogatories, and 2 sets of Requests for Production of Documents (110 requests in total). The Section provided WASCO with access to its public file containing decades of documents and produced various handwritten notes, financial records, drafts, and over 11,000 pages of emails.

3. The Section filed its MSJ on 25 September 2014, including over 1,200 pages of exhibits. Prior to that time, WASCO had served a notice of its intent to take the Section's deposition under N.C.G.S. § 1A-1, Rule 30(b)(6). The discovery deadline had not yet lapsed when the Section filed its MSJ.

4. Without reference to the deposition, WASCO moved for and received a 30-day extension of time to respond to the MSJ. WASCO then filed a second motion for an extension of time, citing N.C.G.S. § 1A-1, Rule 56(f). ALJ Ward denied WASCO's Rule 56(f) motion on 28 October 2014, subject to renewal in WASCO's response to the MSJ. WASCO timely responded to the Section's MSJ, including 7 affidavits and numerous attachments as part of its response.

5. The ALJ granted the Section's MSJ on 2 January 2015 and renewed the denial of WASCO's Rule 56(f) motion, concluding that WASCO had not been prejudiced by the timing of the Section's MSJ and noting that "the putative issues of material fact raised by WASCO do not bear on the determinative legal issue." WASCO filed a Petition for Judicial Review on 2 February 2015, appealing both the 28 October 2014 interlocutory order and the 2 January 2015 final judgment.

Issues Raised by the Petition

6. In its brief before this Court WASCO set forth six issues: (i) whether the ALJ erred by concluding that being "involved" in a facility equates to being an "operator"; (ii) whether the ALJ erred by failing to define the "facility" that WASCO is alleged to have operated; (iii) whether WASCO can be deemed an operator based solely on beneficial remedial activities that occur at closed or inactive facilities; (iv) whether the ALJ confused WASCO and Culligan, treating them as if they were the same entity; (v) whether the facts found by the ALJ are legally insufficient to establish that WASCO is an operator; and (vi) whether the ALJ erred by denying WASCO's request for additional discovery.

7. Because this Court can affirm on any ground supported by the record, this Court will address WASCO's first five issues together, under the umbrella question of whether the ALJ properly granted summary judgment to the Section on the Section's claim that WASCO is a post-closure "operator" as a matter of law.

Standard of Review

8. In a challenge alleging a final agency decision violated the North Carolina Administrative Procedure Act ("NCAPA"), N.C.G.S. § 150B-23(a), this Court sits as a court of appeals. D.B. v. Blue Ridge Ctr., 173 N.C. App. 401, 407, 619 S.E.2d 418, 423 (2005).

9. This Court reviews the ALJ's grant of summary judgment *de novo*, to determine whether there are any genuine issues of material fact and whether any of the parties is entitled to a judgment as a matter of law. York Oil Co. v. N.C. Dep't of Env't, Health & Natural Res., 164 N.C. App. 550, 555, 596 S.E.2d 270, 273-74 (2004) (citing N.C.G.S. §§ 1A-1, Rule 56 and 150B-51(d)). This Court views the evidence "in the light most favorable to the nonmoving party." Richardson v. Bank of Am., N.A., 182 N.C. App. 531, 539, 643 S.E.2d 410, 416 (2007), appeal dismissed, 362 N.C. 227, 657 S.E.2d 353 (2008). The party moving for summary

judgment has the initial burden of showing a lack of a triable issue of fact, in that "an essential element of the opposing party's claim is nonexistent" or the opposing party will be unable to produce evidence to support an essential element of the claim. Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quotation marks omitted). The burden then shifts to the non-movant to "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." Id. (quotation marks omitted). A non-movant cannot create a genuine issue of material fact by resting on the mere allegations or denials contained in its pleadings. N.C.G.S. § 1A-1, Rule 56(e). An issue is material only "if its resolution would prevent the party against whom it is resolved from prevailing." Bone Int'l, Inc. v. Brooks, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981) (quotation marks omitted).

10. Even under *de novo* review, the agency's interpretation of the program it administers is entitled to deference if "reasonable and based on a permissible construction" of the law, especially with "complex and highly technical regulatory program[s], in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." County of Durham v. N.C. Dep't of Env't & Natural Res., 131 N.C. App. 395, 396-97, 507 S.E.2d 310, 311 (1998), disc. rev. denied, 350 N.C. 92, 528 S.E.2d 361 (1999) (quotation marks omitted); Morrell v. Flaherty, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994), cert. denied, 515 U.S. 1122, 132 L. Ed. 2d 282 (1995) (quotation marks omitted).

11. "[I]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." Shore v. Brown, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). This Court will not disturb the judgment "[i]f the correct result has been reached," even if the ALJ assigned an incorrect reason for the judgment entered. Id.

Undisputed Facts

12. This case concerns real property located at 850 Warren Wilson Road, Swannanoa, North Carolina 28778, which is associated with United States Environmental Protection Agency ("EPA") Identification Number NCD 070 619 663 ("the Facility").

13. A pit at the Facility once contained an underground storage tank for waste perchloroethylene ("PCE"), a dry cleaning solvent. The pit was closed as a landfill in 1992 with contaminated soil left in place. Significant groundwater contamination remains today.

14. At various times, the Petitioner has been known as United States Filter Corporation, Water Applications & Systems Corporation, and WASCO LLC (hereafter "WASCO").

15. WASCO became involved with the Facility in a limited capacity following its 1998 acquisition of Culligan Water Technologies, Inc. and its affiliate, Culligan International Company ("Culligan").

16. At the time WASCO acquired Culligan, Culligan had been performing post-closure operations related to the Facility.

17. Between 1999 and 2004, Petitioner provided financial assurance to the Section on behalf of Culligan for post-closure care associated with the Facility, including a Trust Agreement and Irrevocable Standby Letter of Credit in 2003.

18. The Culligan Group, including Culligan, was divested from WASCO in 2004 in a $610-million transaction that included WASCO's agreement to indemnify Culligan's buyer "as to certain matters associated at the Facility as they relate to specific Culligan obligations." (Ex G-4 pp 368-69; Ex G-5 pp 373-78; Ex I-21 p 699)[2]

[2] Exhibit citations refer to the paginated volume accompanying the Section's MSJ.

19. Following the 2004 divestiture, Culligan represented in a letter to the Section that WASCO was "assuming responsibility" for the Facility. The letter indicated that copies were transmitted to John Coyne, the Director of Environmental Affairs for WASCO. (Ex B-12 pp 67-68)

20. The Section followed-up with Mr. Coyne by email, referencing Culligan's representation that WASCO "is now responsible for RCRA issues" at the Facility, and asking for WASCO to complete a new Part A permit application as the Facility's operator. (Ex B-13 pp 70-71)

21. Mr. Coyne responded that (a) he was "very familiar with this project," (b) he would "attend to the Part A application in the very near future," and (c) WASCO "intend[ed] on keeping the same consultants . . . and doing everything else we can to maintain continuity and keep the project headed in the right direction." (Id.)

22. An updated Part A permit application was submitted to the Section in December 2004 naming WASCO as operator. Mr. Coyne signed the Part A permit application for WASCO "under penalty of law" as to the truth of its contents. (Ex D-1 pp 199-212)

23. Mr. Coyne signed another updated Part A "under penalty of law" in 2006, which was submitted to the Section and continued to identify WASCO as operator. (Ex D-2 pp 214-17)

24. Rodney Huerter—who had assumed the role of WASCO's Director of Environmental Affairs after Mr. Coyne—signed a third Part A permit application "under penalty of law" in 2008, which was submitted to the Section and which again identified WASCO as the Facility's operator. (Ex D-3 pp 219-29)

25. After the divestiture of Culligan, WASCO continued to provide financial assurance for the Facility under the 2003 Trust Agreement, Standby Trust Fund, and Irrevocable Standby Letter of Credit, which it amended in the Section's favor for inflation 10 times between

the divestiture of Culligan and the initiation of the 2013 contested case. WASCO has communicated directly with the Section throughout this time period concerning financial requirements for the Facility. (Ex H pp 427-529; Ex Q-1 pp 1178-79)

26. The language of the Trust Agreement identifies WASCO as the "Grantor," and the agreement's purpose to "establish a trust fund . . . for the benefit of DENR." Specifically, the Trust Agreement recites that:

> . . . "DENR" . . . has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available when needed for closure and/or post-closure care of facility . . . .
>
> The Trustee shall make payments from the fund as the Secretary of [DENR] . . . shall direct, in writing, to provide for the payment of the cost of closure and/or post-closure care of facilities covered by this agreement . . . .
>
> "this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Secretary . . ."

(Ex H-13 pp 409-22)

27. The Irrevocable Standby Letter of Credit, as amended, is subject to automatic renewal in one-year increments unless cancelled by the bank. (Ex H-14 p 424)

28. The most recent amendment to the Irrevocable Standby Letter of Credit submitted prior to the filing of the contested case is in the amount of $443,769.88. (Ex H-55 p 524)

29. Internal WASCO communications concerning financial assurance reference "the statutory / regulatory requirements relating to one of our environmental legacy sites in Swannanoa, NC." (Exs H-32 p 464, H-36 p 474, H-40 p 484)

30. After the divestiture of Culligan, WASCO entered into a Master Consulting Services Agreement with Mineral Springs Environmental, P.C. ("Mineral Springs") for Mineral Springs to perform work at the Facility. (Ex K pp 816-20)

31. A total of 51 invoices from Mineral Springs to WASCO shows that Mineral Springs or its subcontractors performed a variety of post-closure activities at the Facility or related to the Facility, between November 2004 and August 2013, which fell into the following categories:

- operation and maintenance of an air sparge / soil vapor extraction groundwater remediation system, including use of a subcontractor for supplies such as air filters, oil filters, oil, and separators;
- groundwater sampling and analysis, including use of laboratory subcontractors;
- preparation of quarterly and semi-annual reports analyzing sampling results;
- project management;
- assessment of two potential sources of contamination at the Facility in addition to the former tank site—specifically, an old dump site and a French drain—including use of an excavation subcontractor and a bush hog subcontractor; and
- payment of utility bills based one meter labeled as "pump" and one meter labeled as "environmental cleanup."

(Ex M pp 986-1106)

32. Mr. Coyne or Mr. Huerter personally approved payment to Mineral Springs for work in the above categories, and approved payment directly to the utility company for additional bills, totaling $235,984.43. (Id.; Ex N pp 1108-25)

33. In particular, Mineral Springs submitted 33 reports associated with the invoiced post-closure activities to the Section on WASCO's behalf between February 2005 and May 2013, including 16 groundwater monitoring reports that expressly identified WASCO as the "responsible party for the site." (Ex I pp 531-801)

34. The Section communicated directly with WASCO, or with both WASCO and Mineral Springs, in numerous matters related to environmental compliance, including but not

limited to requests for preparation of a work plan for the investigation of the former dump site and French drain, and responses to Mineral Springs's monitoring reports. (Ex A pp 2-15; Ex B pp 66-130; Ex Q-2 pp 1181-83)

35. After Mineral Springs and/or its sub-contractors performed the French drain and dump assessment but before drafting the Assessment Report, Kirk Pollard of Mineral Springs notified Mr. Huerter of preliminary findings concerning the volume and nature of drums discovered. Mr. Pollard identified liquid in one drum that tested at a pH of 14, which is considered hazardous based on corrosivity. Mr. Pollard expressed concern for health and safety, recommended that Mr. Huerter notify the Section, and expressed his belief that an immediate response and a more thorough evaluation could be necessary. (Ex L-23 p 883) No such concerns are reflected in the final report. (Ex I-21 pp 694-708)

36. Mr. Huerter instructed Mr. Pollard not to remove "any of the drums, containers, or anything else," and asked to conduct an "advanced review" of the dump Assessment Report before its submission to the Section. Mr. Huerter commented on Mr. Pollard's first draft, including by providing two "reviewed and revised blackline document[s]." (Exs L-23 p 882, L-27 p 892, L-32 pp 911-12, L-39 pp 945-59, L-40 pp 961-75)

37. Additional communications between Mr. Huerter and Mr. Pollard included (a) Mr. Pollard's requests for Mr. Huerter's guidance or authorization on matters related to the Facility, including changes to a Part A form, communications with the property owner, whether groundwater sampling should continue, and whether to advise the Section about the sale of the property (Exs L-21 p 878, L-22 p 880, L-25 p 888, L-34 p 919); (b) Mr. Pollard's practice of updating Mr. Huerter, copying him on communications with the Section, or forwarding such communications to him (Exs B-20 p 91, B-24 p 101, B-27 p 107, B-30 p 113, L-17 p 869, L-25 p 888, L-26 p 890, L-42 p 980); and (c) Mr. Huerter's requests for copies of utility bills to

compare with Mineral Springs's invoices, and annual cost projections (Exs L-9 p 847, L-24 p 885, L-41 p 977).

38. The Section has not alleged that WASCO ever owned the real property at 850 Warren Wilson Road, Swannanoa, NC; caused or contributed to the contamination associated with the Facility; or operated an active business onsite.

Conclusions of Law

39. The undersigned views as material the undisputed facts identified in paragraphs 19 to 37, above, concerning WASCO's involvement with the Facility following its divestiture of Culligan. Additional facts are cited to provide context. The Section has met its initial burden here of proving a lack of a triable issue of fact, as questions of statutory construction are questions of law "for the courts." Oxendine v. TWL, Inc., 184 N.C. App. 162, 164, 645 S.E.2d 864, 865 (2007) (quotation marks omitted). Viewing the evidence in the light most favorable to WASCO, WASCO has failed to produce a forecast of evidence demonstrating that it would be able to make out at least a *prima facie* case at trial that the Section erred under N.C.G.S. § 150B-23(a), as the alleged issues of fact identified by WASCO are immaterial to the resolution of this case. As a matter of law, WASCO is an operator of a landfill for purposes of the State Hazardous Waste Program's post-closure permitting requirement.

40. The "State Hazardous Waste Program" consists of the North Carolina Solid Waste Management Act ("the Act"), contained in Chapter 130A, Article 9 of the North Carolina General Statutes, and the rules promulgated thereunder and codified in Subchapter 13A of Title 15A of the North Carolina Administrative Code ("the Rules"). The Department is authorized to administer the State Hazardous Waste Program in lieu of the federal program under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 to 6992k, as long as the State program remains equivalent to and consistent with the federal program. (Ex P-1 p 1154)

41. The Act instructs the Department to "cooperate . . . with . . . the federal government . . . in the formulation and carrying out of a solid waste management program," including a program for the management of hazardous waste "designed to protect the public health, safety, and welfare; [and to] preserve the environment." N.C.G.S. § 130A-294(a)(2), (b). The Act mandates the adoption of rules to implement that program, which the Department "shall enforce." N.C.G.S. § 130A-294(b). The Rules largely adopt and incorporate the applicable federal regulations by reference. The authority to enforce the State Hazardous Waste Program has been delegated to the Director of the Division of Waste Management. The Director has issued a sub-delegation of this authority to the Chief of the Section. (Ex P pp 1171-75)

42. Based on the federally delegated nature of the State Hazardous Waste Program, the Section's Memorandum of Agreement with the EPA, the fact that the obligation at issue arises under a federal regulation—40 C.F.R. § 270.1(c)—and not Chapter 130A, and because both parties have identified no state case law on point and have cited to federal law, the undersigned concludes it is appropriate here to look to federal case law and administrative EPA documents for guidance. See Air-A-Plane Corp. v. N.C. Dep't of Env't, Health & Natural Res., 118 N.C. App. 118, 454 S.E.2d 297, disc. rev. denied, 340 N.C. 358, 458 S.E.2d 184 (1995) (looking to definitions adopted by reference in 40 C.F.R. § 260.10 in a case involving the assessment of civil penalties under the State Hazardous Waste Program); Skinner v. Preferred Credit, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005), aff'd, 361 N.C. 114, 638 S.E.2d 203 (2006) (stating for issues of first impression that it is proper to "look to other jurisdictions to review persuasive authority that coincides with North Carolina's law").

43. One requirement of the State Hazardous Waste Program is for "operators . . . of landfills" to obtain post-closure permits. 40 C.F.R. § 270.1(c) (adopted by reference at 15A NCAC 13A .0113(a)). Here, the former waste-PCE tank at the Facility is a "landfill." 40

C.F.R. § 265.197(b) (adopted by reference at 15A NCAC 13A .0110(j)). The post-closure permit requirement triggers liability for Facility-wide cleanup ("corrective action"), beyond the scope of the landfill. 40 C.F.R. §§ 270.1(c), 264.100 to .101 (adopted by reference at 15A NCAC 13A .0113(a) and .0109(g)).

44. Under federal regulations adopted by reference, an "operator" is "the person responsible for the overall operation of a facility," or the "operator of any facility or activity subject to regulation under RCRA." 40 C.F.R. §§ 260.10, 270.2 (adopted by reference at 15A NCAC 13A .0102(b), .0113(a)).[3] This Court construes the definitions of operator *in pari materia* with the post-closure permitting requirement at issue here. McGuire v. Dixon, 207 N.C. App. 330, 337, 700 S.E.2d 71, 75 (N.C. Ct. App. 2010).

45. The State Hazardous Waste Program provides for strict liability in enforcement matters, without regard to causation. United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 738 (8th Cir. 1986), cert. denied, 484 U.S. 848, 98 L. Ed. 2d 102 (1987); United States v. Production Plated Plastics, Inc., 742 F. Supp. 956, 960 (W.D. Mich. 1990), aff'd, 955 F.2d 45 (6th Cir. 1992).

46. There can be multiple owners and operators of a single Facility under the State Hazardous Waste Program. 45 Fed. Reg. 33153, 33169 (May 19, 1980). To ensure the Section is able "to gain compliance as quickly as possible," the State Hazardous Waste Program provides for joint and several liability. Id.; RO[4] No. 11005 (Nov. 18, 1980); see also RO 12703 (August 1986) ("EPA considers both the owner (or owners) and operator of a facility to be responsible for

[3] Even if this Court were to consider the definition of "operator" in N.C.G.S. § 130A-290(a)(21), the ALJ properly concluded that the result would be the same. WASCO's reliance on federal RCRA and CERCLA case law and guidance, including Bestfoods, in support of its defense against post-closure operator liability under the State Hazardous Waste Program, supports the conclusion that the State definition is ambiguous as construed *in pari materia* with the post-closure permit requirement.

[4] Citations to "RO" refer to documents contained in the RCRA Online database, maintained by EPA at http://www.epa.gov/epawaste/inforesources/online/index.htm.

regulatory compliance. For this reason, EPA may initiate an enforcement action against either the owner, the operator, or both.").

47. The Section has the right to rely on the representation of any one owner or operator, that it is "assum[ing] and perform[ing] the [regulatory] duties . . . on behalf of all of the parties," and to "look to that designated party" for compliance. 45 Fed. Reg. 72024, 72026-27 (Oct. 30, 1980) (emphasis added).

48. Due to the similarities between the definitions of "operator" under sections 260.10 and 270.2 and another pollution-control statute—the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675—it is proper to look to CERCLA case law as guidance here. RO No. 13071 (Oct. 28, 1987); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1574 (5th Cir. 1988).

49. The United States Supreme Court analyzed the meaning of the term "operator" under CERCLA, and unanimously concluded:

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, ***an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.***

United States v. Bestfoods, 524 U.S. 51, 66-67, 141 L. Ed. 2d 43, 59 (1998) (emphasis added); see also Richardson, 182 N.C. App. at 546-47, 643 S.E.2d at 420-21 (applying Bestfoods in a state case concerning corporate liability).

50. The District Court for the District of Puerto Rico applied Bestfoods to RCRA, finding an individual liable as a RCRA operator where (1) he acted as the facility's representative in discussions with the state regarding an air quality Notice of Violation; (2) a facility employee deferred to him when questioned by EPA inspectors and another employee

would not allow an inspection of the facility without his permission; (3) he authorized an inspection and spoke with EPA inspectors about environmental regulations and a RCRA Information Request; and (4) he signed and certified "under penalty of law" a "Notification of Regulated Waste Activity" form on behalf of the facility. United States v. JG-24, Inc., 331 F. Supp. 2d 14, 75 (D.P.R. 2004), aff'd, 8 F.3d 28 (1st Cir. 2007); see also United States v. Envtl. Waste Control, Inc., 710 F. Supp. 1172, 1202-04 (1989) (rejecting a claim pre-Bestfoods that a person's signature on an EPA compliance document that "affirmatively identifie[d]" him as an operator in three places "was simply [a] mistake," based on the person's role in the day-to-day operations and financial obligations of a RCRA landfill and because he agreed to indemnify a waste broker from Superfund or cleanup-order liability).

51. Examining the "broad, passive language" in Bestfoods that an operator "is one who is involved in operations '*having to do with* the leakage or disposal of hazardous waste,'" the Third Circuit held that a corporation and its sole shareholder were "operators" for purposes of CERCLA even though their only activities at the facility "[had] been those necessary to remove and remediate the soil and groundwater contamination." Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envtl. Prot., 725 F.3d 369, 380-82 (3rd Cir. 2013). The Third Circuit noted that the shareholder-appellant had entered into an agreement with the prior owner to remediate the property in accordance with New Jersey's hazardous waste management program, and to accept financial responsibility for remediation beyond the first $100,000.00. The court emphasized that, "not only did the [operators] have the actual authority to make decisions about compliance with environmental regulations, they hired environmental consultants to conduct tests and remediation operations on the Litgo Property, and they oversaw that work." Id. at 381, 382 n.6.

52. In another decision applying Bestfoods, the Sixth Circuit held that a township which contracted with a landowner to use a waste dump was an "operator" under CERCLA

because, rather than "operating at arm's length with a contractor," it (1) "made repeated and substantial ad hoc appropriations"; (2) "made arrangements (including with the local Junior Fire Department) for bulldozing and other maintenance when [the owner] himself proved unequal to the task"; and (3) "took responsibility for ameliorating the unacceptable condition of the dump, before and after scrutiny from the state government," over a number of years. United States v. Township of Brighton, 153 F.3d 307, 315-16 (6th Cir. 1998).

53. The District of Kansas found that the president of a corporation, while "two layers removed from the day-to-day supervision of operations," was directly liable under Bestfoods as a CERCLA operator where he participated in weekly meetings that addressed environmental compliance issues, and where "no decisions were made at those meetings without [his] approval." City of Wichita v. Trs. of the Apco Oil Corp. Liquidating Trust, 306 F. Supp. 2d 1040, 1055-56 (D. Kan. 2003). The court emphasized "the frequency of those meetings, and the fact that [the president] was actively involved in deciding matters of environmental compliance." Id. at 1056.

54. Consistent with Bestfoods and its progeny, this Court determines that post-closure operatorship is based on an examination of the totality of the circumstances. The undersigned does not deem any one factor dispositive, but considers all indicia of operatorship in the record, which overwhelmingly supports the conclusion that WASCO "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution" at the Facility, including making "decisions about compliance" with post-closure regulations. Bestfoods, 524 U.S. at 66-67, 141 L. Ed. 2d at 59. Based on the undisputed facts identified above, these indicia of operatorship can be categorized as follows:

55. WASCO "took responsibility for ameliorating the unacceptable condition" of the Facility through affirmative representations to the Section and by WASCO's conduct, as

described further in paragraphs 19 to 25 and 33. Township of Brighton, 153 F.3d at 315-16. Affirmative representations included three Part A forms submitted to the Section and signed under penalty of law. See G-24, Inc., 331 F. Supp. 2d at 75; Envtl. Waste Control, Inc., 710 F. Supp. at 1202-04.

56. WASCO "became directly involved in environmental and regulatory matters" through the work of its former Directors of Environmental Affairs, Mr. Coyne and Mr. Huerter, who "actively participated in and exerted control over a variety of [the facility's] environmental matters," including by issuing "directives regarding [the facility's] responses to regulatory inquiries." Bestfoods at 72, 141 L. Ed. 2d at 62 (quotation marks and citations omitted). Paragraphs 21, 25, and 34 to 37 support this conclusion.

57. As described further in paragraphs 25 to 32, WASCO has made "repeated and substantial ad hoc appropriations" for post-closure care. Township of Brighton, 153 F.3d at 315-16. Such a financial role included hiring and paying for substantial work of an environmental consultant, and paying for the operation of the air sparge / soil vapor extraction corrective action system, totaling $235,984.43. Litgo N.J. Inc., 725 F.3d at 381, 382 n.6. Further, WASCO provided irrevocable financial assurance amended numerous times for inflation, including one such amendment adjusting the amount to $443,769.88 in June 2013, shortly before the filing of WASCO's contested case.

58. As in Litgo, the fact that WASCO's involvement has been limited to post-closure operations rather than active business operations is not a barrier to liability. The Litgo Court expressly rejected the claim that entities "should not be held liable as current operators because they have only managed remedial activities on the site." 725 F.3d at 380-82.

59. In a matter of impression under the State Hazardous Waste Program, which is a complex and highly technical regulatory program that requires interpretation of both State and

federal law, the Section's construction of 40 C.F.R. § 270.1(c) (adopted by reference in 15A NCAC 13A .0113(a)) was both "reasonable" and "based on a permissible construction" of that regulation, especially considering the Section's need to make a policy judgment as to operator liability, and to rely on such judgment in order to gain compliance as quickly as possible and prevent the kind of delays that have resulted from the present litigation. County of Durham, 131 N.C. App. at 396-97, 507 S.E.2d at 311 (quotation marks omitted); Morrell, 338 N.C. at 238, 449 S.E.2d at 180.

60. The undersigned has considered the five subsidiary issues raised by WASCO as identified in paragraph 6, above. The undersigned deems WASCO's protective filer argument abandoned, as it was not presented to the ALJ, Amanini v. N.C. Dep't of Human Res., 114 N.C. App. 668, 681; 443 S.E.2d 114, 121-22 (1994), but views this doctrine as inapplicable in any event. To the extent the conclusions of law herein do not already resolve WASCO's remaining issues, none of WASCO's arguments were sufficient to raise a genuine issue of material fact or provide a valid basis to support its claim that it is not an operator as a matter of law. In light of the undersigned's *de novo* review, ability to affirm on any ground supported by the record, and conclusion that the Section acted properly under the NCAPA and the undisputed material facts by characterizing WASCO as a post-closure operator as a matter of law, this Court deems it unnecessary to address WASCO's first five issues in further detail.

61. In sum, the undisputed facts identified above show that WASCO, through its hired environmental consultant, has been the only person supplying and maintaining post-closure financial assurance for the Facility, operating remediation systems onsite, performing groundwater sampling and reporting, and making decisions about compliance with the post-closure requirements of the State Hazardous Waste Program since 2004. WASCO is "responsible for the overall operation" of the Facility for purposes of the post-closure program.

62. Finally, while WASCO has raised a cursory challenge to ALJ Ward's 28 October 2014 interlocutory order denying WASCO's Motion for Continuance Regarding Respondent's Summary Judgment Motion, WASCO has failed to identify any legal grounds to support its bald claim that ALJ Ward's ruling on the Section's MSJ prior to the completion of discovery and the taking of the Section's deposition under N.C.G.S. § 1A-1, Rule 56 was error. The undersigned notes the substantial discovery exchanged by the parties prior to the filing of the Section's MSJ, as described in paragraph 2; the fact that the instant case had been in litigation for approximately one year prior to the filing of the Section's MSJ; WASCO's detailed legal arguments on the merits as supported by 7 affidavits—including a claim that it is entitled to reverse summary judgment—and the overwhelming nature of the evidence in the record in support of the Section's substantive arguments. WASCO has not been prejudiced by the timing of the Section's MSJ and ALJ Ward's final judgment.

Order

WHEREFORE, IT IS HEREBY ORDERED AND DECREED THAT ALJ Ward's 28 October 2014 interlocutory order in OAH Docket No. 13 EHR 18253, denying WASCO's Motion for Continuance Regarding Respondent's Summary Judgment Motion the Petition for Judicial Review, be and hereby is AFFIRMED, and the final decision ALJ Ward entered in the same matter on 2 January 2015, granting summary judgment in favor of Respondent, be and hereby is AFFIRMED. WASCO is an "operator" for purposes of 40 C.F.R. § 270.1(c) (adopted by reference in 15A NCAC 13A .0113(a)) and must comply with all attendant responsibilities and regulatory requirements. WASCO's PJR is DENIED.

This the 23rd day of October, 2015.

The Honorable G. Bryan Collins, Jr.
Superior Court Judge presiding

2017 WL 1381586
Only the Westlaw citation is currently available.
Court of Appeals of North Carolina.

WASCO LLC, Petitioner,
v.
N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, Respondent.

No. COA16-414
|
Filed: April 18, 2017

Appeal by petitioner from order and judgment entered 23 October 2015 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 6 October 2016. Wake County, No. 15 CVS 1438

Attorneys and Law Firms

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Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Hirschman, for respondent-appellee.

Opinion

McCULLOUGH, Judge.

***1** Petitioner WASCO LLC (WASCO) appeals from the final order and judgment in which the trial court affirmed the administrative law judge's (ALJ) denial of WASCO's motion for continuance and affirmed the ALJ's grant of summary judgment in favor of respondent North Carolina Department of Environment and Natural Resources (the "Department"), Division of Waste Management (the "Division"). For the following reasons, we affirm.

I. Background

This appeal is the result of a petition for a contested case hearing filed by WASCO in the Office of Administrative Hearings on 27 September 2013. In the petition, WASCO sought a declaration that it was not an "operator" of a former textile manufacturing facility located at 850 Warren Wilson Road in Swannanoa, North Carolina (the "Site"), and, therefore, not responsible for remedial cleanup efforts required by federal and state laws governing the management of hazardous wastes. Those laws include portions of the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. §§ 6901-6992, federal regulations, and North Carolina's Hazardous Waste Program (the "State Hazardous Waste Program").

As the United States Supreme Court clearly explained,

> RCRA is a comprehensive environmental statute that empowers [the Environmental Protection Agency (EPA)] to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 USC §§ 6921-6934. (Nonhazardous wastes are regulated much more loosely under Subtitle D, 42 USC §§ 6941-6949.) Under the relevant provisions of Subtitle C, EPA has promulgated standards governing hazardous waste generators and transporters, *see* 42 USC §§ 6922 and 6923, and owners and operators of hazardous waste treatment, storage, and disposal facilities (TSDF's), *see* § 6924. Pursuant to § 6922, EPA has directed hazardous waste generators to comply with handling, recordkeeping, storage, and monitoring requirements, *see* 40 CFR pt 262 (1993). TSDF's, however, are subject to much more stringent regulation than either generators or transporters, including a 4 to 5-year permitting process, *see* 42 USC § 6925; 40 CFR pt 270 (1993); US Environmental Protection Agency Office of Solid Waste and Emergency Response, The Nation's Hazardous Waste Management Program at a Crossroads, The RCRA Implementation Study 49-50 (July 1990), burdensome financial assurance requirements, stringent design and location standards, and, perhaps most onerous of all, responsibility to take corrective action for releases of

> hazardous substances and to ensure safe closure of each facility, *see* 42 USC § 6924; 40 CFR pt 264 (1993).

City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 331-32, 114 S.Ct. 1588, 1590, 128 L.Ed.2d 302, 307-308 (1994).

In lieu of the federal program, RCRA allows states to develop, administer, and enforce their own hazardous waste programs, subject to authorization by EPA. *See* 42 U.S.C. § 6926 (2016). State programs must meet the minimum requirements of RCRA. *Id.* (requiring state programs to be "equivalent" to the federal hazardous waste program). EPA granted North Carolina final authorization to operate the State Hazardous Waste Program in 1984. *See* 49 Fed. Reg. 48694-01 (Dec. 14, 1984).

***2** The State Hazardous Waste Program is administered by the Division's Hazardous Waste Section (the "Section"). *See* 15A N.C. Admin. Code 13A.0101(a) (2016). The State Hazardous Waste Program consists of portions of the North Carolina Solid Waste Management Act (the "State Solid Waste Management Act"), Article 9 of Chapter 130A of the General Statutes, and related state rules and regulations. Specifically, Part 2 of the State Solid Waste Management Act concerns "Solid and Hazardous Waste Management" and requires that rules establishing a complete and integrated regulatory scheme in the area of hazardous waste management be adopted and enforced. *See* N.C. Gen. Stat. § 130A-294(c) (2015). North Carolina's Hazardous Waste Management Rules (the "State Hazardous Waste Rules") are found in Title 15A, Subchapter 13A of the N.C. Administrative Code. The State Hazardous Waste Rules largely incorporate the federal regulations under RCRA by reference.

Pertinent to the present case, the State Hazardous Waste Rules adopt closure and post-closure standards for owners and operators of hazardous waste TSDF's from subpart G of the federal regulations. *See* 15A N.C. Admin. Code 13A.0109(h) (incorporating by reference 40 C.F.R. §§ 264.110 through 264.120). The State Hazardous Waste Rules also implement a hazardous waste permit program, which incorporates much of the federal hazardous waste permit program, with added "Part B" information requirements. *See* 15A N.C. Admin. Code 13A.0113 (incorporating by reference portions of 40 C.F.R. Ch. 1, Subch. I, Pt. 270,).

40 C.F.R. § 270.1(c) is one of those sections of the federal hazardous waste permit program incorporated by reference in 15A N.C. Admin. Code 13A.0113(a). That section provides, in pertinent part, that

> [o]wners and operators of surface impoundments, landfills, land treatment units, and waste pile units that received waste after July 26, 1982, or that certified closure (according to § 265.115 of this chapter) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under § 270.1(c)(5) and (6), or obtain an enforceable document in lieu of a post-closure permit, as provided under paragraph (c)(7) of this section. If a post-closure permit is required, the permit must address applicable 40 CFR part 264 groundwater monitoring, unsaturated zone monitoring, corrective action, and post-closure care requirements of this chapter.

40 C.F.R. § 270.1(c) (2017). It is WASCO's responsibility to obtain a post-closure permit for the Site that is at issue in the present case.

As mentioned above, the Site is a former textile manufacturing facility located at 850 Warren Wilson Road in Swannanoa, North Carolina. Years before WASCO became involved with the Site, Asheville Dyeing & Finishing (AD&F), a division of Winston Mills, Inc., operated a knitwear business on the Site. During the operation of the knitwear business, underground tanks were used to store virgin and waste perchloroethylene (PCE), a dry cleaning solvent. At some point prior to 1985, PCE leaked from the tanks and contaminated the soil. The storage tanks were excavated by Winston Mills in 1985 and the resulting pits were backfilled with the contaminated soil left in place.

In 1990, Winston Mills and the Section entered into an Administrative Order on Consent that set forth a detailed plan to close the Site. Winston Mills completed the closure plan to close the Site as a landfill in 1992 and the Section accepted certifications of closure in a 1993 letter to Winston Mills.

Winston Mills and its parent corporation, McGregor Corporation, sold the site to Anvil Knitwear, Inc., in 1995. In connection with the sale, Winston Mills provided

Anvil Knitwear indemnification rights for "environmental requirements." Culligan International Company (Culligan) co-guaranteed Winston Mills' performance of indemnification for environmental liabilities.

***3** WASCO became involved in 1998 when its predecessor in interest, United States Filter Corporation, acquired stock of Culligan Water Technologies, Inc., which owned Culligan. Thereafter, WASCO provided financial assurances to the Section on behalf of Culligan in the form of a trust fund to the benefit of the Department and an irrevocable standby letter of credit for the account of AD&F.

WASCO divested itself of Culligan in 2004. As part of the sale of Culligan, WASCO agreed to indemnify the buyer as to identified environmental issues at the Site. At that time, a letter from Culligan to the Section represented that WASCO was assuming Culligan's remediation responsibilities at the Site and directing further communications to WASCO's director of environmental affairs. Subsequent communications between WASCO and the Section show that WASCO did intend to take on those responsibilities and that the Section identified WASCO as the responsible party. Additionally, Part A permit applications signed by WASCO's director of environmental affairs identified WASCO as the operator and WASCO continued to pay consultants and take action at the Site.

In 2007, WASCO received a letter from the Section that the Site was included on a list of facilities needing corrective action. A follow-up letter from the Section soon thereafter indicated that additional action was needed to develop a groundwater assessment plan to address the migration of hazardous waste in the groundwater. This expanded the size of the area with which WASCO was dealing to off-site locations. WASCO, its consultant, and the Section continued to work together to address a groundwater plan.

In 2008, Anvil Knitwear sold the property to Dyna-Diggr, LLC. Thereafter, responsibility for compliance with the State Hazardous Waste Program became an issue, with both WASCO and Anvil disclaiming responsibility. WASCO asserted it participated in post-closure actions on a voluntary basis.

In an 16 August 2013 letter, the Section detailed its positions that Dyna-Diggr is liable as an owner and that WASCO is independently liable as an operator. The Section sought cooperation between all parties and suggested it "would be willing to enter into a modified Joint Administrative Order on Consent in Lieu of a Post-Closure Permit pursuant to which the two parties agree to undertake part of the post-closure responsibilities[.]" However, in the alternative, the Section reminded the parties that it "always has the option of issuing a Compliance Order with Administrative Penalty to both parties for violation of 40 CFR 270.1(c) and associated post-closure regulations." This action resulted in WASCO filing the 27 September 2013 petition.

Following the filing of the petition, on 25 September 2014, the Section filed a motion for summary judgment on all claims raised in WASCO's petition. After the ALJ denied WASCO's motion for a continuance regarding the summary judgment motion by order filed 28 October 2014, the ALJ filed his final decision granting the Section's motion for summary judgment on 2 January 2015.

On 2 February 2015, WASCO filed a petition for judicial review (the "PJR") of both orders. After both parties filed briefs regarding the PJR, the matter came on for hearing in Wake County Superior Court on 12 October 2015 before the Honorable G. Bryan Collins, Jr.

On 23 October 2015, the court filed its "Final Order and Judgment on Rule 56(f) Motion and Petition for Judicial Review." The court concluded, "[a]s a matter of law, WASCO is an operator of a landfill for purposes of the State Hazardous Waste Program's post-closure permitting requirement." Therefore, the court affirmed the 2 January 2015 final decision of the ALJ granting summary judgment in favor of the respondent and denied WASCO's PJR. In the decretal portion of the court's order, the court reiterated that "WASCO is an 'operator' for purposes of 40 C.F.R. § 270.1(c) (adopted by reference in 15A [N.C. Admin. Code] 13A.0113(a)) and must comply with all attendant responsibilities and regulatory requirements."

***4** Wasco filed notice of appeal to this Court on 20 November 2015.

II. Discussion

The issue on appeal is whether the trial court erred in entering summary judgment in favor of the Section on the basis that, "[a]s a matter of law, WASCO is an operator of a landfill for purposes of the State Hazardous Waste Program's post-closure permitting requirement." WASCO contends that it is not, and has never been, an operator of any facility at the Site.

Under the Administrative Procedure Act, when a party to a review proceeding in a superior court appeals to the appellate division from the final judgment of the superior court, "[t]he scope of review to be applied by [this Court] ... is the same as it is for other civil cases." N.C. Gen. Stat. § 150B-52 (2015). "Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

Citing *In re Appeal of N.C. Sav. & Loan League*, 302 N.C. 458, 276 S.E.2d 404 (1981), WASCO asserts that in our de novo review, the Section's interpretation of the law is entitled to no deference. However, this Court has stated that "an agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C.App. 594, 598, 620 S.E.2d 14, 17 (2005). In fact, in *N.C. Sav. & Loan League*, the Court explained as follows,

> [w]hen the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

302 N.C. at 465-66, 276 S.E.2d at 410 (internal citations and quotation marks omitted). Thus, the Section's interpretation is afforded some deference.

"Operator" is defined in various places throughout the State Solid Waste Management Act and the State Hazardous Waste Rules. First, the general definitions in Part 1 of the State Solid Waste Management Act define "operator" to mean "any person, including the owner, who is principally engaged in, and is in charge of, the actual operation, supervision, and maintenance of a solid waste management facility and includes the person in charge of a shift or periods of operation during any part of the day." N.C. Gen. Stat. § 130A-290(a)(21) (2015). This definition applies broadly to the entire State Solid Waste Management Act, including those portions relevant to hazardous waste management. The definition's application to hazardous waste management is evident from the definition provision in the State Hazardous Waste Rules, which provides that both the definition of "operator" in N.C. Gen. Stat. § 130A-290 applies to the State Hazardous Waste Rules, *see* 15A N.C. Admin. Code 13A.0102(a) (providing "[t]he definitions contained in [N.C. Gen. Stat. §] 130A-290 apply to this Subchapter[ ]"), and that the definition of "operator" in 40 C.F.R. § 260.10, "[o]perator means the person responsible for the overall operation of a facility[,]" is incorporated by reference, *see* 15A N.C. Admin. Code 13A.0102(b). Yet, most specific to the post-closure permit requirement at issue in this case, the State Hazardous Waste Rules concerning the hazardous waste permit program incorporate by reference Subpart A of the federal regulations providing general information about the hazardous waste permit program, *see* 15A N.C. Admin. Code 13A.0113(a), including the definitions in 40 C.F.R. § 270.2, which provides that "[o]wner or operator means the owner or operator of any facility or activity subject to regulation under RCRA." 40 C.F.R. § 270.2 (2017).

***5** In this case, the court determined WASCO was an "operator" under the two definitions specifically dealing with hazardous waste management adopted from 40 C.F.R. §§ 260.10 and 270.2. The court, however, noted that the result would be the same applying the definition of "operator" in N.C. Gen. Stat. § 130A-290(a)(21). In conclusion number 42, the court explained its analysis of the definitions as follows,

> [b]ased on the federally delegated nature of the State Hazardous Waste Program, the Section's Memorandum of Agreement with the EPA, the fact that the obligation at issue arises under a federal regulation—40 C.F.R. § 270.1(c)—and not Chapter 130A, and because both parties have identified no state case law on point and have cited to federal law, [the court] concludes it is appropriate here to look to federal case law and

> administrative EPA documents for guidance.

The federal case law considered by the court included cases analyzing operator liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 to 9675 (CERCLA), which, similar to the State Hazardous Waste Rules, defines "operator" as "any person owning or operating such facility[.]" 42 U.S.C. § 9601(20)(A) (2016). Specifically, the court looked to *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998), in which the Court explained that,

> under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66-67, 118 S.Ct. 1876, 141 L.Ed.2d at 59. The court in the present case then concluded that "[c]onsistent with *Bestfoods* and its progeny, ... post-closure operatorship is based on an examination of the totality of the circumstances."

On appeal, WASCO's first contention is that the court erred in basing its decision exclusively on CERCLA without considering the elements of the operator definition in N.C. Gen. Stat. § 130A-290(a)(21). WASCO contends that the definition in N.C. Gen. Stat. § 130A-290(a)(21) sharpened the definition of operator for purposes of the State Solid Waste Management Act and, citing *R.J. Reynolds Tobacco Co. v. N.C. Dep't of Environment & Natural Resources*, 148 N.C.App. 610, 616, 560 S.E.2d 163, 167-68 (looking to the plain meaning of N.C. Gen. Stat. § 130A-290(35) and determining that tobacco scrap, stems, and dust did fall within the definition of "solid waste"), *disc. review denied*, 355 N.C. 493, 564 S.E.2d 44 (2002), contends the definition in N.C. Gen. Stat. § 130A-290(a)(21) is controlling over other definitions to the extent the definitions differ. Thus, WASCO contends to be an operator, it must be "principally engaged in, and is in charge of, the actual operation, supervision, and maintenance of a solid waste management facility[.]" N.C. Gen. Stat. § 130A-290(a)(21).

We are not persuaded by WASCO's arguments that the court is limited to an analysis of the definition of "operator" in N.C. Gen. Stat. § 130A-290(a)(21). Moreover, we note that it is clear the court did not look exclusively to CERCLA, but instead looked to CERCLA only for guidance on how to interpret the definitions of operator in the State Hazardous Waste Rules adopted from the federal regulations. Despite differences in the framework of RCRA and CERCLA, the definitions of "operator" in both acts are similar and CERCLA case law does provide persuasive guidance. Furthermore, and not contested by WASCO on appeal, the court also looked to EPA documents providing guidance on RCRA and concluded that those documents support the conclusion that WASCO was an operator.

***6** We hold the court was correct to look for guidance in federal law while interpreting the term "operator" in the context of the State Hazardous Waste Rules and, specifically, the hazardous waste permit program. Those portions of the State Hazardous Waste Rules deal specifically with the post-closure permit requirement at issue in the present case. *See* 40 C.F.R. § 270.1(c) (incorporated by reference in 15A N.C. Admin. Code 13A.0113(a)). In contrast, the terms of N.C. Gen. Stat. § 130A-290(a)(21) make clear that the definition of operator therein is for an operator of any "solid waste management facility." Although that definition is more detailed than the definitions in the State Hazardous Waste Rules, that definition was intended to apply to the management of all solid wastes, not just the control of hazardous wastes of a facility post-closure.

Nevertheless, although the three definitions of "operator" applicable to the State Hazardous Waste Program differ slightly, the definitions seem to be in accord that, in general terms, an "operator" is the person responsible for, or in charge of, the facility subject to regulation. In the present case, that facility is the pit that was certified closed as a landfill in 1993.

WASCO's next contention on appeal is that the court erred in holding that WASCO was an operator even though WASCO did not become involved with the Site until after the Site was certified closed by the Section. Citing N.C. Gen. Stat. § 130A-290(a)(2), which defines "closure" to mean "the cessation of operation of a solid waste management facility and the act of securing the facility so that it will pose no significant threat to human health or the environment[,]" WASCO asserts that it is

impossible to operate a facility that has ceased operation. Thus, WASCO contends it cannot be an operator of the Site.

WASCO, however, recognizes that both RCRA and the State Hazardous Waste Program impose duties on operators to provide post-closure care, but contends that those duties can only be imposed on those owning and operating the facility before the time that the facility ceases to operate. WASCO asserts that the Section has created the concept of "post-closure operator" for purposes of this case without any basis in the law. Again, we disagree with WASCO's arguments.

As the Section points out, and as we noted above,

> [o]wners and operators of ... landfills ... must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under § 270.1(c)(5) and (6), or obtain an enforceable document in lieu of a post-closure permit, as provided under paragraph (c)(7) of this section.

See 40 C.F.R. § 270.1(c) (incorporated by reference in 15A N.C. Admin. Code 13A.0113(a)).

In this case, the pit where the underground storage tanks were located on the Site was not designated a landfill for purposes of the State Hazardous Waste Program until the time that it was closed with hazardous waste in place, after the time the facility ceased to operate. *See* 40 C.F.R. § 265.197(b) (incorporated by reference in 15A N.C. Admin. Code 13A.0110(j)). Thus, there were no "operators" of a landfill when the facility was in operation, as WASCO limits the term. Yet, the hazardous waste permit program clearly applies to operators of landfills and those facilities closed as landfills.

Moreover, although the definition of "closure" cited by WASCO is clear that the closure of a solid waste management facility is the time it ceases to operate, that definition also makes clear closure includes the act of securing the facility to prevent future harm. Thus, it is not just those parties in charge of the actual operation of a solid waste management facility that are subject to the post-closure permitting requirement.

*7 Guided by the same federal law relied on by the trial court, including *Bestfoods*, its progeny, and EPA documents, we hold "operator," as it is defined in the State Hazardous Waste Rules, includes those parties in charge of directing post-closure activities under the State Hazardous Waste Program and RCRA.

In the present case, the trial court issued detailed findings as to WASCO's involvement at the Site that demonstrate it was the operator for purposes of the post-closure permitting requirement. WASCO does not challenge the factual findings, but instead asserts arguments that those findings do not lead to the conclusion that it is an operator as that term is defined in N.C. Gen. Stat. § 130A-290(a)(2). We are not convinced by WASCO's arguments.

The court's pertinent findings, which this Court has reviewed and determined to be supported by the documentary exhibits, are as follows:

> 15. WASCO became involved with the Facility in a limited capacity following its 1998 acquisition of Culligan Water Technologies, Inc. and its affiliate, Culligan International Company ("Culligan").
>
> 16. At the time WASCO acquired Culligan, Culligan had been performing post-closure operations related to the Facility.
>
> 17. Between 1999 and 2004, Petitioner provided financial assurance to the Section on behalf of Culligan for post-closure care associated with the Facility, including a Trust Agreement and Irrevocable Standby Letter of Credit in 2003.
>
> 18. The Culligan Group, including Culligan, was divested from WASCO in 2004 in a $610-million transaction that included WASCO's agreement to indemnify Culligan's buyer "as to certain matters associated at the Facility as they relate to specific Culligan obligations."
>
> 19. Following the 2004 divestiture, Culligan represented in a letter to the Section that WASCO was "assuming responsibility" for the Facility. The letter indicated that copies were transmitted to John Coyne, the Director of Environmental Affairs for WASCO.
>
> 20. The Section followed-up with Mr. Coyne by email, referencing Culligan's representation that WASCO "is now responsible for RCRA issues" at the Facility, and asking for WASCO to complete a new Part A permit application as the Facility's operator.
>
> 21. Mr. Coyne responded that (a) he was "very

familiar with this project," (b) he would "attend to the Part A application in the very near future," and (c) WASCO "intend[ed] on keeping the same consultants ... and doing everything else we can to maintain continuity and keep the project headed in the right direction."

22. An updated Part A permit application was submitted to the Section in December 2004 naming WASCO as operator. Mr. Coyne signed the Part A permit application for WASCO "under penalty of law" as to the truth of its contents.

23. Mr. Coyne signed another updated Part A "under penalty of law" in 2006, which was submitted to the Section and continued to identify WASCO as operator.

24. Rodney Huerter—who had assumed the role of WASCO's Director of Environmental Affairs after Mr. Coyne—signed a third Part A permit application "under penalty of law" in 2008, which was submitted to the Section and which again identified WASCO as the Facility's operator.

25. After the divestiture of Culligan, WASCO continued to provide financial assurance for the Facility under the 2003 Trust Agreement, Standby Trust Fund, and Irrevocable Standby Letter of Credit, which it amended in the Section's favor for inflation 10 times between the divestiture of Culligan and the initiation of the 2013 contested case. WASCO has communicated directly with the Section throughout this time period concerning financial requirements for the Facility.

***8** 26. The language of the Trust Agreement identifies WASCO as the "Grantor," and the agreement's purpose to "establish a trust fund ... for the benefit of [the Department]." Specifically, the Trust Agreement recites that:

> ... "DENR" ... has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available when needed for closure and/or post-closure care of facility....
>
> The Trustee shall make payments from the fund as the Secretary of [the Department] ... shall direct, in writing, to provide for the payment of the cost of closure and/or post-closure care of facilities covered by this agreement....
>
> "this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Secretary ..."

27. The Irrevocable Standby Letter of Credit, as amended, is subject to automatic renewal in one-year increments unless cancelled by the bank.

28. The most recent amendment to the Irrevocable Standby Letter of Credit submitted prior to the filing of the contested case is in the amount of $443,769.88.

29. Internal WASCO communications concerning financial assurance reference "the statutory/regulatory requirements relating to one of our environmental legacy sites in Swannanoa, NC."

30. After the divestiture of Culligan, WASCO entered into a Master Consulting Services Agreement with Mineral Springs Environmental, P.C. ("Mineral Springs") for Mineral Springs to perform work at the Facility.

31. A total of 51 invoices from Mineral Springs to WASCO shows that Mineral Springs or its subcontractors performed a variety of post-closure activities at the Facility or related to the Facility, between November 2004 and August 2013, which fell into the following categories:

- operation and maintenance of an air sparge/soil vapor extraction groundwater remediation system, including use of a subcontractor for supplies such as air filters, oil filters, oil, and separators;

- groundwater sampling and analysis, including use of laboratory subcontractors;

- preparation of quarterly and semi-annual reports analyzing sampling results;

- project management;

- assessment of two potential sources of contamination at the Facility in addition to the former tank site—specifically, an old dump site and a French drain—including use of an excavation subcontractor and a bush hog subcontractor; and

- payment of utility bills based [on] one meter labeled as "pump" and one meter labeled as "environmental cleanup."

32. Mr. Coyne or Mr. Huerter personally approved payment to Mineral Springs for work in the above categories, and approved payment directly to the utility company for additional bills, totaling $235,984.43.

33. In particular, Mineral Springs submitted 33 reports associated with the invoiced post-closure activities to the Section on WASCO's behalf between February 2005 and May 2013, including 16 groundwater monitoring reports that expressly identified WASCO as the "responsible party for the site."

34. The Section communicated directly with WASCO, or with both WASCO and Mineral Springs, in numerous matters related to environmental compliance, including but not limited to requests for preparation of a work plan for the investigation of the former dump site and French drain, and responses to Mineral Springs's monitoring reports.

***9** 35. After Mineral Springs and/or its sub-contractors performed the French drain and dump assessment but before drafting the Assessment Report, Kirk Pollard of Mineral Springs notified Mr. Huerter of preliminary findings concerning the volume and nature of drums discovered. Mr. Pollard identified liquid in one drum that tested at a pH of 14, which is considered hazardous based on corrosivity. Mr. Pollard expressed concern for health and safety, recommended that Mr. Huerter notify the Section, and expressed his belief that an immediate response and a more thorough evaluation could be necessary. No such concerns are reflected in the final report.

36. Mr. Huerter instructed Mr. Pollard not to remove "any of the drums, containers, or anything else," and asked to conduct an "advanced review" of the dump Assessment Report before its submission to the Section. Mr. Huerter commented on Mr. Pollard's first draft, including by providing two "reviewed and revised blackline document[s]."

37. Additional communications between Mr. Huerter and Mr. Pollard included (a) Mr. Pollard's requests for Mr. Huerter's guidance or authorization on matters related to the Facility, including changes to a Part A form, communications with the property owner, whether groundwater sampling should continue, and whether to advise the Section about the sale of the property; (b) Mr. Pollard's practice of updating Mr. Huerter, copying him on communications with the Section, or forwarding such communications to him; and (c) Mr. Huerter's requests for copies of utility bills to compare with Mineral Springs's invoices, and annual cost projections.

(Citations and footnote omitted).

It is clear that the pit at the Site that was certified closed as a landfill in 1993 is subject to post-closure regulation under the State Hazardous Waste Program and RCRA. Considering the above facts, we hold WASCO was the party responsible for and directly involved in the post-closure activities subject to regulation. Even under the definition of operator in N.C. Gen. Stat. § 130A-290(a)(21), when that definition is viewed through the lens of post-closure regulatory activities at issue in this case, since 2004, WASCO has been the party principally engaged in, or in charge of the post-closure operation, supervision, and maintenance of the Site for purposes of the hazardous waste permit program. WASCO's arguments to the contrary are overruled.

III. Conclusion

For the reasons stated above, we hold WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site. Therefore, we affirm the final order and judgment of the trial court.

AFFIRMED.

Judges STROUD and ZACHARY concur.

All Citations

--- S.E.2d ----, 2017 WL 1381586

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